IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN R. GAMMINO Plaintiff	:	CIVIL ACTION NO. 04-CV-4303
v.	:	
DAVEL COMMUNICATIONS, INC. Defendant	:	

PLAINTIFF'S MOTION TO STAY PAYMENT OF COSTS PENDING APPEAL

Plaintiff, John R. Gammino ("Gammino"), moves for this Honorable Court to stay Gammino's payment of costs submitted by Defendant, Davel Communications, Inc. ("Davel"), pending an appeal of summary judgment entered in this case, and he states as follows:

1. On October 4, 2007, this Court granted a Motion for Summary Judgment filed by Davel and subsequently, Gammino filed with this Court a Notice of Appeal to the Federal Circuit of United States Court of Appeals on November 1, 2007.

2. On November 6, 2007, Davel filed a bill of costs in the amount of $15,222.99.

3. In the appeal to the Federal Circuit, Gammino will ask the Federal Circuit to reverse the summary judgment against Gammino and remand the case to this Court. Gammino's expectation is that the summary judgment will be reversed. The payment now of the bill of costs would turn out to be premature in

the event of a reversal by the Federal Circuit and would require a repayment from Davel to Gammino.

4. Patent infringement issues will be decided in the appeal to the Federal Circuit which is the court of appeals that exclusively hears all patent appeals. As such, it is appropriate for this court to delay payment of costs pending the outcome of the appeal to the Federal Circuit.

5. The court in In re Cypress Semiconductor Securities Litigation, 1995 WL 779116, No. C-92-20048 RPA (N.D. Cal December 29, 1995) had before it a similar request and that court granted the plaintiff's request for a stay and ordered that the payment of costs were "STAYED until 30 days after receipt of the remittitur from the Ninth Circuit." Id. at 1. Like this case, in In re Cypress Semiconductor Securities Litigation the case was on appeal when the request was made for the stay. In In re Cypress Semiconductor Securities Litigation the court's discussion on the granting of the stay just related to the fact that the case was before the ninth circuit: "(f)inally, Plaintiff's request to stay the award of costs until 30 days after receipt of remittitur from the Nine Circuit is GRANTED." Id. at 2.

6. Gammino filed a patent infringement action in John R. Gammino v. Southwestern Bell Telephone Company, before the United States District Court for the Northern District of Texas, Dallas Division (Action # 3:05-CV-0850-K) and it involves the same two Gammino patents at issue in this case. The Southwestern Bell court granted summary judgment in favor of Southwestern Bell on validity and infringement. Gammino appealed that holding and moved for

a stay of paying costs pending his appeal to the Federal Circuit. The court in the Southwestern Bell case granted Gammino's motion and currently there is a stay on the payment pending the appeal to the Federal Circuit. Attached as Exhibits A and B are copies of the court's Order granting the stay in the Southwestern Bell case (Exhibit A) and Gammino's Motion for Stay and the supporting brief in the Southwestern Bell case (Exhibit B).

7. This case and the Southwestern Bell case involve the same two patents and both also involve an entry of summary judgment on liability in favor of a defendant and an appeal to the Federal Circuit by the Plaintiff. It is suggested that this Court, like the Southwestern Bell court, should stay the payment of costs while the appeal to the Federal Circuit is pending.

8. Gammino respectfully requests that the payment of costs be STAYED until 30 days after receipt of the remittitur from the Federal Circuit.

WHEREFORE, the Court should order that the payment of costs is STAYED until 30 days after receipt of the remittitur from the Federal Circuit.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN R. GAMMINO Plaintiff v. DAVEL COMMUNICATIONS, INC. Defendant	: : : : : : :	CIVIL ACTION NO. 04-CV-4303

PLAINTIFF'S BRIEF IN SUPPORT OF HIS MOTION TO STAY PAYMENT OF COSTS PENDING APPEAL

Plaintiff, John R. Gammino ("Gammino"), moves for this Honorable Court to stay Gammino's payment of costs of Davel Communications, Inc. ("Davel") pending Gammino's appeal to the Federal Circuit.

In the appeal to the Federal Circuit, Gammino will ask the Federal Circuit to reverse the summary judgment against Gammino and remand the case to this Court. Gammino's expectation is that the summary judgment will be reversed. The appeal is to the Federal Circuit which specializes in patent cases and as such it is appropriate to delay payment of costs until the Federal Circuit issues an order on the patent issues.

The court in In re Cypress Semiconductor Securities Litigation, 1995 WL 779116, No. C-92-20048 RPA (N.D. Cal December 29, 1995) had before it a similar request and that court granted the plaintiff's request for a stay and ordered that the payment of costs were "STAYED until 30 days after receipt of the remittitur from the Ninth Circuit." Id. at 1. Like this case, in In re Cypress Semiconductor Securities Litigation the case was on appeal when the request was made for the stay. In In re Cypress Semiconductor Securities Litigation the court's discussion on the granting of the stay just related to the fact that the case was before the ninth circuit: "(f)inally, Plaintiff's request to stay the award of costs until 30 days after receipt of remittitur from the Nine Circuit is GRANTED." Id. at 2.

The case of John R. Gammino v. Southwestern Bell Telephone Company, Action # 3:05-CV-0850-K (Northern District of Texas), involves the same two Gammino patents at issue in this case. The Southwestern Bell court granted summary judgment in favor of Southwestern Bell on validity and infringement. Gammino appealed that holding and moved for a stay of paying costs pending his appeal to the Federal Circuit. The court in the Southwestern Bell case granted Gammino's motion and currently there is a stay on the payment of costs pending the appeal to the Federal Circuit. Attached as Exhibits A and B are copies of the court's Order granting the stay in the Southwestern Bell case (Exhibit A) and Gammino's Motion for Stay and the supporting brief in the Southwestern Bell case (Exhibit B).

This case and the Southwestern Bell case involve the same two patents, entry of summary judgment for defendants and an appeal to the Federal Circuit by the Plaintiff. This Court, like the Southwestern Bell court, should stay the payment of costs while the appeal to the Federal Circuit is pending.

The ultimate outcome of this case could be directly decided by the decision of the Federal Circuit and the payment of costs should be stayed pending the appeal to the Federal Circuit.

CONCLUSION

The Court should order that the payment of Davel's costs is STAYED until 30 days after receipt of the remittitur from the Federal Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent via electronic mail through the Court's ECF system to counsel of record, excluding Plaintiff's counsel, as follows:

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